

STATE OF SOUTH CAROLINA

(Caption of Case)

Application of Hargray Wireless, LLC for
Designation as an Eligible Telecommunications
Carrier Under 47 U.S.C. § 214(e)(2).

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

COVER SHEET

DOCKET

NUMBER: 2003 - 227 - C

(Please type or print)

Submitted by: Margaret M. Fox

SC Bar Number: 65418

Address: McNair Law Firm, P. A.

Telephone: 803-799-9800

P. O. Box 11390

Fax: 803-753-3219

Columbia, SC 29211

Other:

Email: pfox@mcnair.net

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BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2003-227-C

IN RE: Application of Hargray Wireless, LLC for)
 Designation as an Eligible Telecommunications) **PROPOSED ORDER**
 Carrier Under 47 U.S.C. § 214(e)(2).) (on behalf of SCTC)

I. PROCEDURAL BACKGROUND

This matter comes before the South Carolina Public Service Commission ("Commission") upon the petition of Hargray Wireless, LLC ("Hargray") for designation as an Eligible Telecommunications Carrier ("ETC"), pursuant to 42 U.S.C. § 214(e)(2), for the purpose of receiving federal universal service funding.

A public hearing was held in this matter on June 28, 2007. Hargray was represented by William W. Jones and David A. LaFuria. Hargray presented the direct testimony of Cedric Debardeleben, Todd Pence, and Don J. Wood. Hargray also presented the reply testimony of Don J. Wood.

The South Carolina Telephone Coalition ("SCTC") was represented by M. John Bowen, Jr., and Margaret M. Fox. The SCTC presented the direct and reply testimony of Glenn H. Brown.

United Telephone Company of the Carolinas, d/b/a Embarq ("Embarq") was represented by Scott Elliott and H. Edward Phillips, III. Embarq presented the reply testimony of Brian K. Staihr.

The Office of Regulatory Staff ("ORS") was represented by Lessie Hammonds and Shealy Reibold. ORS did not present a witness.

II. DISCUSSION

This docket was established to consider Hargray's petition to be designated as an ETC for purposes of receiving federal USF. Section 254(e) of the federal Telecommunications Act of 1996 ("Act") provides that only an ETC as designated under Section 214(e) of the Act may receive federal universal service support.

The goal of universal service is to ensure the widespread availability of affordable basic local exchange telephone service. Universal service has long been a public policy. See, e.g., 47 U.S.C. § 151, § 254; see also S.C. Code Ann. § 58-9-280(E), Commission Order No. 2001-419 in Docket No. 97-239-C at pp. 25-31 (Section III, Universal Service Policy and History). Any consideration of a petition to designate an ETC for purposes of receiving federal funds intended to preserve and advance universal service should be undertaken in a manner consistent with these overall goals.

Section 214(e) requires that a telecommunications carrier seeking designation as an ETC must offer the services that are supported by federal universal service support mechanisms, and must advertise the availability of those services and the charges therefor using media of general distribution.

The Federal Communications Commission ("FCC") has defined the services that are supported by Federal universal service support mechanisms to include the following nine (9) core services:

1. voice grade access to the public switched network;
2. local usage;

3. dual tone multi-frequency signaling or its functional equivalent;
4. single party service or its functional equivalent;
5. access to emergency services;
6. access to operator services;
7. access to interexchange service;
8. access to directory assistance; and
9. toll limitation for qualifying low-income consumers.

47 C.F.R. § 54.101(a). These nine services must be offered throughout the service area for which the designation is received, and must be offered using either the ETC's own facilities or a combination of its own facilities and resale of another carrier's services. 47 U.S.C. § 214(e)(1); 47 C.F.R. § 54.201(d)(1). The requirement that a carrier "offer" the service does not mean that it must actually provide ubiquitous service prior to certification as an ETC and, in fact, the Commission cannot place such a condition on a carrier prior to certification. See, e.g., Federal-State Joint Board on Universal Service, RCC Holdings, Inc., Petition for Designation as an Eligible Telecommunications Carrier Throughout its Licensed Service Area in the State of Alabama, Memorandum Opinion and Order, DA 02-3181 (Wireless Comp. Bureau, rel. Nov. 27, 2002).

The FCC has adopted additional requirements that must be met by carriers seeking ETC designation from the FCC. See Federal-State Joint Board on Universal Service, Report and Order, 20 FCC Rcd 6371 (released March 17, 2005) ("FCC ETC Order"). According to the FCC's additional requirements, in order to be designated as an ETC, the carrier must (1) (i) Commit to provide service throughout its proposed designated service area to all customers making a reasonable request for service; (ii) Submit a five-year plan that describes with

specificity proposed improvements or upgrades to the applicant's network on a wire center-by-wire center basis throughout its proposed designated service area; (2) Demonstrate its ability to remain functional in emergency situations; (3) Demonstrate that it will satisfy applicable consumer protection and service quality standards; (4) Demonstrate that it offers a local usage plan comparable to the one offered by the incumbent LEC in the service areas for which it seeks designation; and (5) Certify that the carrier acknowledges that the FCC may require it to provide equal access to long distance carriers in the event that no other ETC is providing equal access within the service area. 47 C.F.R. § 54.202(a). Specifically, with respect to the five-year plan, the FCC requires:

Each applicant shall demonstrate how signal quality, coverage or capacity will improve due to the receipt of high-cost support; the projected start date and completion dates for each improvement and the estimated amount of investment for each project that is funded by high-cost support; the specific geographic areas where the improvements will be made; and the estimated population that will be served as a result of the improvements. If an applicant believes that service improvements in a particular wire center are not needed, it must explain its basis for this determination and demonstrate how funding will otherwise be used to further the provision of supported services in that area.

47 C.F.R. § 54.202(a)(1)(ii).

This Commission is currently in the process of a rulemaking proceeding in Docket No. 2006-37-C to establish standards for designating ETCs in the State of South Carolina for purposes of receiving federal universal service funding. While The FCC's requirements are not binding on this Commission, we have stated that, in evaluating ETC applications such as Hargray's during the interim period prior to issuance of the Commission's own ETC regulations, we will "consider the FCC's guidelines regarding designation of new ETCs in conjunction with the Commission's existing framework of analysis of ETC applications as reflected in prior Commission orders such as Order # 2005-5, dated January 7, 2005, in Docket # 2003-158-C. In

other words, we should be informed by – but not controlled by – those FCC guidelines, and the public interest should be paramount in our considerations.” See Directive issued by the Commission in Docket No. 2006-37-C, dated May 30, 2007.

With respect to the public interest determination, Section 214(e)(2) of the Act sets forth the analysis a state commission must perform in designating ETCs as follows:

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

(Emphasis added.)

While the states are free to establish their own public interest tests, in instances where states have declined or failed to exercise their jurisdiction under Section 214(e)(2), the FCC has applied a public interest analysis pursuant to its authority under Section 214(e)(6). Initially the FCC’s standard was very lenient, and the FCC granted applications for ETC status based solely on a generalized statement by the applicant that doing so would bring the benefits of competition to the designated area. See, e.g., Guam Cellular and Paging, Inc., DA 02-174 (rel. January 12, 2002). However, concerns about exponential growth in the size of the federal USF, as well as a specific concern that the FCC’s policy was not consistent with the intended use of universal service funding in high cost areas, led to the evolution of a more stringent public interest analysis. See In the Matter of Federal State Joint Board on Universal Service, Virginia Cellular, LLC Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth

of Virginia, Memorandum Opinion and Order, FCC 03-338, CC Docket No. 96-45 (released January 22, 2004) ("Virginia Cellular"); In the Matter of Federal State Joint Board on Universal Service, Highland Cellular, Inc. Petition for Designation as an Eligible Telecommunications Carrier in the Commonwealth of Virginia, Memorandum Opinion and Order, FCC 04-37, CC Docket No. 96-45 (released April 12, 2004) ("Highland Cellular").

In these orders, the FCC clearly stated that the burden of proof was on the applicant to demonstrate that the public interest would be served by granting the application. Virginia Cellular at ¶ 26; Highland Cellular at ¶ 20. According to the FCC, the value of competition alone is not sufficient to satisfy the public interest test in rural areas. Virginia Cellular at ¶ 4; Highland Cellular at ¶ 4. The determination of public interest instead requires a fact-specific balancing of the benefits and costs. Virginia Cellular at ¶ 28; Highland Cellular at ¶ 22. Factors that should be considered include: The benefits of increased competitive choice; the impact of multiple ETC designations on the universal service fund; whether the benefits of an additional ETC outweigh any potential harms; the unique advantages and disadvantages of the competitor's service offering; any commitments regarding quality of service; and the competitive ETC's ability to provide the supported services throughout the designated service area within a reasonable time frame. Virginia Cellular at ¶ 28; Highland Cellular at ¶ 22.

Even more recently, concerns with preserving universal service funding for its intended purposes in light of a burgeoning federal universal service fund led the Federal-State Joint Board on Universal Service ("Joint Board") to recommend that the FCC "take immediate action to rein in the explosive growth in high-cost universal service disbursements" by imposing an interim, emergency cap on the amount of high-cost support that competitive ETCs may receive. Recommended Decision, In the Matter of High-Cost Universal Service Support and Federal-

State Joint Board on Universal Service, WC Docket No. 05-337 and CC Docket No. 96-45, FCC 07J-1, released May 1, 2007 ("Recommended Decision"), at ¶ 1.

While the FCC seems to be moving in the right direction in examining these issues and in applying a more fact-specific and stringent public interest analysis, we note that we are not bound by the FCC's analysis, but instead have the obligation to fulfill the statutory mandate of Congress as well as our own statutory mandate by ensuring that designating additional ETCs in South Carolina serves the public interest, convenience and necessity. Certainly with respect to rural areas, Congress has specifically expressed an affirmative mandate for the Commission to do so, and has given the Commission the discretion as to whether or not to designate multiple ETCs in such areas.¹ Before designating any carrier as an ETC in South Carolina, we must carefully consider its application; make an affirmative finding that it is in the public interest to designate that carrier as an ETC, particularly with respect to service in rural areas; and adopt reasonable and rational requirements to ensure that any carriers we may designate as ETCs in South Carolina will use the federal USF funds they receive to preserve and advance the goals of universal service.

This Commission has previously adopted a public interest test which requires us to conduct a specific, fact-intensive analysis to determine whether the public benefits associated with the designation will outweigh the public costs created by supporting an additional ETC. Order No. 2005-5 at p. 26, ¶ 7. We have also stated that, in making a public interest determination, we must keep in mind as our overriding principle the purpose of universal service funding, which is to ensure that consumers in all regions of the nation have access to quality

¹ 47 U.S.C. § 214(e)(2) ("Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.")

telecommunications services at just, reasonable, and affordable rates, and that the services and rates in rural, insular, or high cost areas are comparable to those in urban areas. *Id.* at p. 27, ¶ 8. As we stated in our prior order, the federal USF is and should be treated as a scarce national resource. *Id.* at p. 31, ¶ 15. Therefore, we must carefully weigh the costs and risks associated with granting an application for ETC designation against the asserted benefits.

III. HARGRAY'S APPLICATION

Initial Application

Hargray filed its initial Application on July 24, 2003. In its Application, Hargray described the area for which it sought designation as the area served by Hargray pursuant to its FCC authorization as the C Block personal communications service ("PCS") carrier in Basic Trading Area ("BTA") No. 410, which covers, in relevant part, the counties of Beaufort, Hampton, and Jasper in the southern portion of South Carolina. Hargray sought certification in the entire study areas served by incumbent local exchange carriers ("ILECs") Bluffton and Hargray Telephone Companies. Hargray also sought certification in a portion of the study area served by ILEC United Telephone Company of the Carolinas (now doing business as "Embarq"). Hargray requested that Embarq's service area be redefined such that each wire center would be reclassified as a separate service area. Hargray sought designation only in certain Embarq wire centers as specified in the Application and, in its initial Application, requested designation below the wire center level in those Embarq areas where Hargray serves only a portion of the wire center.

Hargray stated that it offers, or is prepared to offer, the nine supported services throughout its proposed ETC service area, and that it would advertise the availability of each of the supported services throughout its licensed service area, by media of general distribution.

Hargray stated that granting its application would serve the public interest by promoting competition and facilitating the provision of advanced communications services to rural South Carolina.

Amended Application

On June 16, 2006, Hargray filed an Amended Application to provide additional information consistent with the FCC ETC Order. Specifically, Hargray committed to meeting all of the annual reporting requirements adopted in the FCC ETC Order, including the filing of a five-year network improvement plan, network outage reports, and other required certifications and reports adopted therein. In addition, Hargray amended its initial Application to remove the request for designation in partial wire centers, and to provide a creamskimming analysis for those areas where it sought certification in only a portion of rural ILEC Embarq's study area. Hargray also provided information to demonstrate that it offers a local usage plan comparable to that of the ILEC in the service areas for which it sought designation. Specifically, Hargray stated that it offers an unlimited local calling plan comprising Hargray's licensed service area (BTA 410) for a monthly price of \$20 for a guaranteed two-year period.

Appendices A-C to the Amended Application consisted of three spreadsheets, which show the following:

Appendix A: the cell sites, switch upgrades, and other improvements that are already planned during the next five years regardless of ETC status;

Appendix B: the network improvements in addition to those listed in Appendix A that Hargray proposes to make within the first five years of receiving USF support if designated as an ETC; and

Appendix C: the total proposed network improvements during Hargray's first five years of receiving USF support.

The Amended Application also included two maps, designated as Appendices D and E, showing the following:

Appendix D: approximation of additional voice coverage that would result from investments with USF support; and

Appendix E: approximation of additional voice coverage that would result from investments without USF support.

Hargray also committed to report annually on its progress so that any changes in construction plans can be properly explained.

Hargray's Appendices A-E were granted confidential treatment by the Commission. See Order No. 2006-415. Also attached to Hargray's Amended Application was a non-confidential exhibit, Appendix F, showing population densities to support Hargray's statement that it would not engage in creamskimming with respect to those areas where it sought to serve only portions of rural ILEC Embarq's wire centers.

By letter dated June 18, 2007, Hargray filed revised Appendices A-C. The appendices were revised to remove investments in EVDO² equipment, and to remove certain redundant equipment additions reflected on Appendix B that were already reflected on Appendix A.

On June 20, 2007, Hargray sent a letter to the Commission with an attached new Appendix G. Appendix G is a breakout by quarter of Hargray's planned expenditures for the first two years after being designated as an ETC, and annual figures for years three through five. Hargray requested confidential treatment of Appendix G.

² EVDO stands for Evolution – Data Optimized, and represents equipment necessary to provide broadband services over wireless networks. TR. at 231, ll. 1-3.

The initial and amended Applications, as well as all Appendices thereto, were entered into the record as Hearing Exhibit No. 7, with Appendices A, B, C, D, E, and G entered under seal and subject to proprietary treatment.

IV. FINDINGS AND CONCLUSIONS

1. The Commission has authority, pursuant to Section 214(e)(2) of the Act, to make a determination regarding Hargray's application for designation as an ETC for purposes of receiving federal USF.
2. Hargray proposes to offer the nine services designated for universal service support set forth in 47 C.F.R. § 54.101(a), using either Hargray's own facilities or a combination of its own facilities and resale of another carrier's services. See Amended Application at pp. 3-5, 10; TR. at 16, 25.
3. Section 214(e)(2) of the Act allows the Commission discretion in all ETC designation cases to consider the public interest, convenience and necessity.
4. Pursuant to the statutory standard set forth in Section 214(e)(2) of the Act, the Commission "may," but is not required to, designate more than one carrier as an ETC for a service area served by a rural telephone company.
5. With respect to areas served by rural telephone companies, before the Commission may designate additional ETCs to serve such areas, Section 214(e) of the Act requires that the Commission make an affirmative finding that such designation is in the public interest.

6. The applicant has the burden of proving that it meets the requirements to be designated, and that its designation as an ETC is in the public interest. See Virginia Cellular at ¶ 26; Highland Cellular at ¶ 20.

7. In addition to the initial threshold public interest finding, the Commission has the authority to impose additional requirements on carriers it designates as ETCs in South Carolina. Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999). In doing so, we will be informed by – but not controlled by – the additional requirements adopted by the FCC as set forth in 47 C.F.R. § 54.202(a).

8. In addition, we will use the existing framework of analysis of ETC applications as reflected in our prior orders, specifically Order No. 2005-5 in Docket No. 2003-158-C. With respect to the threshold public interest finding, this requires us to conduct a specific, fact-intensive analysis to determine whether the benefits associated with the designation will outweigh the public costs.

9. Universal service funding is intended to ensure that consumers in all regions of the nation have access to quality telecommunications services at just, reasonable, and affordable rates, and that the services and rates in rural, insular, or high cost areas are comparable to those in urban areas. 47 U.S.C. § 254(b). In determining whether granting a request for designation as an ETC serves the public interest, we must keep in mind this overriding principle.

10. Federal USF for ILECs is based on the incumbent's cost and is paid two years after the ILEC has already made such investments and incurred such costs. TR. at 217, 277-78. On the other hand, if Hargray is designated as an ETC, it will receive federal USF based on the ILEC's investments and costs, and not on anything that Hargray does or does not do with such universal service funds. TR. at 278. Furthermore, Hargray will be eligible for funding upon

designation, and subject to oversight only after federal USF is received and spent. See TR. at 217, 278. That is why it is important to examine up front how a competitive ETC plans to spend universal service money, in order to ensure that these public funds will indeed serve the public interest as determined by this Commission.

11. The primary public benefit from designating a competitive ETC does not come from improved coverage in low-cost areas the carrier already serves, but from expanding signal coverage to previously unserved areas, where such investment would not otherwise be economically viable. See TR. at 222-23, 227, 244-45, 281, 304-05.

12. The real issue for us to decide is not whether Hargray will improve its network with any federal USF monies received, but whether the public interest will be served thereby. We find it is appropriate to grant Hargray's application only if Hargray has clearly demonstrated that the public benefits of doing so will exceed the public costs.

13. The five-year plan submitted by Hargray is lacking in a number of respects. First, after removal of the EVDO equipment included in Appendices A-C to Hargray's Amended Application, the projected spending by Hargray pursuant to its five-year plan is less than the amount of federal universal service funding Hargray is projected to receive as an ETC over the same period. See TR. at 48 (based on the most recent projections from the Universal Service Administrative Corporation, Hargray would receive roughly \$2.8 million per year in federal high-cost support, or a total of approximately \$14 million over the first five years after designation); compare total amount of planned expenditures over first five years shown on Appendix G (Hearing Exhibit No. 7); see also TR. at 226, ll. 2-5; 281, ll. 9-10. This is a fundamental problem with the five-year plan that cannot be overcome by Hargray's vague promise to spend whatever money it may receive for appropriate and intended purposes [see TR.

at 102, ll. 19-22] or by its agreement to file a revised five-year plan if the Commission asks for one [see TR. at 107, ll. 1-5]. The FCC requires the submission of a detailed five-year plan as part of the application for a reason, and that is to allow the examination of proposed expenditures in detail and prior to designating a carrier as an ETC. See 47 C.F.R. § 54.202(a). While this Commission is not bound by the FCC requirements, we believe it is reasonable, at a minimum, to require an applicant to demonstrate a commitment to serve, and to provide a detailed showing of how it proposes to spend federal USF funds prior to obtaining ETC designation, as set forth in 47 C.F.R. § 54.202(a)(1)(ii).

14. Another fundamental problem with Hargray's five-year plan is that Hargray did not include a baseline map showing existing coverage. See TR. at 221, ll. 13-18; see also Hearing Exhibit No. 7. Without a baseline map, it is impossible to assess how Hargray will expand its signal coverage to unserved areas in South Carolina due to the receipt of high-cost support. A baseline map would allow the Commission to determine whether scarce universal service dollars are being used to expand signal coverage into previously unserved or underserved areas, or whether they are instead being used for network upgrades and capacity additions in the lower-cost areas Hargray already serves, and in which it faces competition from other wireless carriers. See TR. at 221, ll. 18-23; 23.

15. Not only did Hargray fail to provide a baseline ("before") coverage map, but it did not provide a true "after" coverage map showing the sites Hargray proposes to build using federal USF dollars. The map Hargray provided showing "after" coverage included not only the sites that would be built using federal USF, but also those that would be built even if Hargray is not designated as an ETC. See TR. at 76; Appendix E to Amended Application (included in Hearing Exhibit No. 7). From the maps provided by Hargray, it is not possible to determine

whether approval of Hargray's request to be designated as an ETC would result in additional incremental coverage to South Carolina's citizens. Again, Hargray's statement at the hearing that it would provide these maps to the Commission if requested [see TR. at 97, ll. 5-9] does not cure the fundamental deficiency in Hargray's Application and the showing it made before the Commission, because it would not allow the Commission and interested parties to examine Hargray's proposal in the context of the hearing addressing Hargray's designation as an ETC.

16. Additionally, Hargray's plan does not provide sufficient detail regarding start and completion dates of each specific improvement plan, specific geographic areas in which each improvement project will be made, or the estimated population that will be served as a result of the improvement, as specified in 47 C.F.R. § 54.202(a)((ii). See Application, as amended, and Appendices A through G (Hearing Exhibit No. 7); TR. at 222, ll. 4-12.

17. In arguing that its designation as an ETC would serve the public interest, Hargray relies extensively on the asserted public benefits of improved wireless coverage. See, e.g., TR. at 49-52. However, there is evidence in the record that wireless service is available to the public from as many as seven other carriers in the service area in question. TR. at 23, 70.

18. Even if Hargray could demonstrate additional public benefits, these may well be temporary, because Hargray has not addressed the very real risks that spreading finite universal service resources too thin will create to critical carrier of last resort principles. See TR. at 205-06. Explosive growth in the size of the federal USF could threaten the long-term viability of the fund, thereby jeopardizing the continued provision of affordable basic local exchange service to rural subscribers. Id. Mr. Brown testified that, if the Commission grants Hargray's application based upon its showing in this proceeding, other wireless service providers would likely seek ETC designation as well in order to remain competitive with each other. See TR. at 236. As we

have previously recognized, the federal USF is and should be treated as a scarce national resource.

19. We find that Hargray has not met its burden of establishing that the public interest will be met by granting its request for designation as an ETC in areas served by rural telephone companies in the State of South Carolina. There is insufficient evidence in the record for this Commission to make a determination as to the benefits the public will receive in the form of expanded coverage into previously unserved areas. The evidence of record indicates that the costs and risks associated with granting Hargray's request outweigh the asserted benefits.

IT IS THEREFORE ORDERED THAT:

Hargray's request for designation as an eligible telecommunications carrier within certain areas of the State of South Carolina is denied.

This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Executive Director

(SEAL)

BEFORE THE
PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

Docket No. 2003-227-C

Application of Hargray Wireless, LLC.)
for Designation as an Eligible)
Telecommunications Carrier Under)
47 U.S.C. § 214(e)(2))

**CERTIFICATE
OF SERVICE**

I, Rebecca W. Martin, Secretary for McNair Law Firm, P. A., do hereby certify that I have this date served one (1) copy of the attached Proposed Order on behalf of the South Carolina Telephone Coalition regarding the above-referenced matter on the following parties by causing said Proposed Order to be deposited with the United States Postal Service, first class postage prepaid and affixed thereto, and addressed as shown below.

William W. Jones, Esquire
Jones, Patterson, Simpson
& Newton, P. A.
Post Office Drawer 7049
Hilton Head, South Carolina 29938

Darra W. Cothran, Esquire
Woodward, Cothran & Herndon
Post Office Box 12399
Columbia, South Carolina 29211

Scott A. Elliott, Esquire
Elliott & Elliott
721 Olive Street
Columbia, South Carolina 29205


Stan J. Bugner
Verizon South, Incorporated
1301 Gervais Street, Suite 825
Columbia, South Carolina 29201

C. Lessie Hammonds, Esquire
Office of Regulatory Staff
Post Office Box 11263
Columbia, South Carolina 29211

Steven W. Hamm, Esquire
Richardson Plowden Carpenter
& Robinson, P. A.
Post Office Drawer 7788
Columbia, South Carolina 29202

H. Edward Phillips, Esquire
Embarq
14111 Capital Boulevard
Mailstop: NCWKFR0313
Wake Forest, North Carolina 27587-5900

David A. LaFuria, Esquire
Lukas, Nace, Gutierrez & Sachs, Chartered
1650 Tysons Boulevard, Suite 1500
McLean, Virginia 22102



Rebecca W. Martin
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina
(803) 799-9800

August 15, 2007

Columbia, South Carolina